SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WN PARTNER, LLC,

Petitioner,

-against-

BALTIMORE ORIOLES LIMITED PARTNERSHIP,

Respondent.

Index No.: _____

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF THE ORDER TO SHOW CAUSE FOR
A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

This action seeks emergency relief to enjoin Respondent Baltimore Orioles Limited Partnership (the "Orioles" or "BOLP") from pursuing an arbitration it has filed before the American Arbitration Association ("AAA").

Petitioner WN Partner LLC (the "Washington Nationals" or "Nationals") and the Orioles are parties to a Partnership Agreement dated September 6, 2005 (the "Partnership Agreement"), [redacted].

The underlying dispute here concerns MASN's failure in 2018 to make cash flow distributions to the partners. [redacted]

The Nationals in October 2018 submitted the cash flow distributions dispute to the MLB Commissioner for arbitration. In submitting the dispute, the Nationals explained that the Orioles had declined to mediate and therefore waived mediation.

In response, the Orioles ***did not contest*** the MLB Commissioner's jurisdiction to arbitrate the dispute or determine arbitrability. Rather, the Orioles ***invoked*** the Commissioner's jurisdiction and asked him to determine arbitrability: the Orioles asked the Commissioner to rule that the parties should first mediate the dispute before arbitrating. At the Orioles' urging, the

Commissioner did determine arbitrability, and in early November 2018 directed that the parties should first mediate, and that the Nationals' arbitration demand would be held "in abeyance" in the meantime.

The parties then mediated but did not resolve the dispute. The Nationals so notified the Commissioner's Office during the afternoon of March 22, 2019, and asked that the Commissioner promptly schedule the arbitration previously submitted by the Nationals.

But thereafter, on the night of March 22, 2019, the Orioles made an arbitration demand to the AAA – asserting for the first time that MLB purportedly had a financial interest in the Nationals because of a $25 million advance that MLB had made to the Nationals, in connection with a separate matter, in 2013, and which the Nationals had agreed voluntarily in February 2018 to pay back for reasons unrelated to this dispute. The Orioles' assertion of an MLB financial interest was predicated solely on information that had been available to the Orioles for more than a year, and certainly in October 2018 when the Orioles asked the Commissioner to determine the arbitrability of the Nationals' arbitration demand. The Orioles, in their demand to the AAA, did not disclose (i) the prior pending arbitration before the MLB Commissioner, and (ii) that the Orioles had themselves previously asked the Commissioner to determine arbitrability of this very dispute.

The Nationals on March 27, 2019, formally objected in writing to the Orioles' arbitration demand, explaining that under the circumstances here, the AAA had no jurisdiction. But at the Orioles' urging, the AAA on April 2, 2019, said that the Nationals' objection raised an arbitrability issue that would be referred to an AAA tribunal, and that the AAA would proceed with an administrative teleconference with the parties.

On April 4, 2019, the MLB Commissioner's Office notified the parties that "threshold questions exist as to whether the Commissioner has jurisdiction over this dispute and who should decide this jurisdictional question. The Commissioner invites the parties to submit their arguments as to these questions, as well as proposals as to how the two fora should deal with the fact that competing arbitration proceedings have now been demanded, to my attention by no later than April 18, 2019. Each party may also respond to the other's submission by no later than May 2, 2019." The Nationals promptly notified the AAA of the Commissioner's message. The Nationals reiterated their objection to any assertion of jurisdiction by the AAA, and asked the AAA to cancel the planned administrative conference.

But again at the Orioles' urging, the AAA on April 8, 2019, determined to proceed with its referral of arbitrability to an AAA tribunal, and to proceed with an administrative conference on April 9, 2018 at 11 am.

The Nationals seek emergency relief, because compelling a party to arbitrate in a forum to which it did not agree constitutes irreparable harm. *See* Point III, *infra.*

Here, the Nationals are very likely to succeed in establishing that the AAA lacks jurisdiction, including to determine arbitrability. In late 2018, the Orioles affirmatively asked the MLB Commissioner to determine arbitrability of this very dispute. When the Commissioner did so, he also held the Nationals' pending arbitration demand before the Commissioner "in abeyance," and again the Orioles did not object. Indeed, the Orioles followed the Commissioner's instructions and participated in the mediation the Commissioner had required at the Orioles' request. Case law is clear that a party can consent to arbitration in a particular venue based on its course of conduct. *Gvozdenovic v. United Airlines*, 933 F.2d 1100, 1105 (2d Cir.

1991) ("[a]lthough a party is bound by an arbitral award only where it has agreed to arbitrate, an agreement may be implied from the party's conduct."). *See* Point II(A), *infra.*

Furthermore, the equities weigh heavily in favor of enjoining the Orioles from pursuing arbitration before the AAA. The Orioles plainly consented to the Commissioner's jurisdiction to decide arbitrability of this dispute, but thereafter made a strategic gambit to initiate an after-the-fact proceeding in the AAA. The Orioles' asserted grounds for doing so – that MLB purportedly had a financial interest in the Nationals – ring hollow, particularly given that the Orioles never made that assertion during the five months between October 2018 (when the Nationals commenced arbitration before the Commissioner) and March 2019, when the Orioles filed a demand concerning the exact same dispute with the AAA. The assertion also is false, as shown herein. *See* Point IV, *infra.*

Moreover, the underlying dispute resolution clause was drafted by the Orioles themselves and MLB, at a time when the Nationals were still owned by MLB. The Nationals' current owners, the Lerner family, only purchased the team the year after the Partnership Agreement had been negotiated and executed by the Orioles and MLB. It is thus particularly unctuous for the Orioles now to seek to disregard the dispute resolution clause at the Nationals' expense. *Id.*

For all the reasons herein, this Court should enjoin the Orioles' from taking any further steps to pursue arbitration before the AAA, and require the Orioles to submit to the MLB Commissioner any objections to arbitrability of the Nationals' demand.

STATEMENT OF FACTS

A. The governing contract calls for disputes to be arbitrated by the MLB Commissioner except in limited circumstances not applicable here.

[redacted]

[1] References to "Ex. __" are to exhibits in the accompanying Declaration of Stephen R. Neuwirth, dated April 8, 2019.

[redacted]

B. MLB has no ownership or financial interest in the Nationals.

Since MLB sold its ownership interest to the Lerners in 2006, MLB has not had any ownership or financial interest in the Nationals.

The Orioles claim that MLB has "financial interest" in the Nationals on account of a $25 million advance that MLB extended to the Nationals in August 2013, in the course of attempting to facilitate a settlement of a separate dispute between the parties arising under a separate contract: specifically, a dispute concerning the amount of fees MASN was to pay the Nationals for the exclusive right to televise Nationals games, pursuant to a March 2005 Agreement. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689, at *2 (N.Y. Sup. Ct. 2015).

Based on the arbitration clause in that separate agreement, the rights fee dispute was arbitrated in 2012 before MLB's Revenue Sharing Definitions Committee (the "RSDC"). *Id.* The RSDC reached a decision in 2012, but it was not formally issued until 2014. *Id.* at *3-4. In the interim, MLB encouraged the parties to settle. *Id.* In that context, MLB by mid-2012 had informed the parties that the award was substantially higher than the amounts that MASN, wholly controlled by the Orioles, had unilaterally been paying the Nationals. But MASN, at the

Orioles' direction, continued to pay only the lower amount of rights fees for which they had advocated before the RSDC.

To encourage the negotiations, MLB in August 2013 made an advance to the Nationals totaling approximately $25 million, to make up for the shortfall in 2012 and 2013 between the amount of rights fees MASN was paying the Nationals and the amount the RSDC had determined to award. [redacted]

The negotiations were not successful, and the RSDC issued its award in 2014. The Supreme Court vacated the award, but solely on grounds related to the Nationals having been represented by the law firm Proskauer Rose LLP (a firm that concurrently represented MLB, and interests related to the RSDC members, in unrelated matters). *See TCR Sports*, 2015 WL 6746689, at *9-13. Notably, Supreme Court expressly rejected arguments by the Orioles that the award should be vacated based on MLB's $25 million advance to the Nationals. *Id*. at *8-9. The court also rejected the Orioles' argument that any new arbitration be held in the AAA (rather than in the RSDC). *Id.* at *13, n.21.

The First Department affirmed those conclusions, 153 A.D.3d 140, and the Orioles failed in their bids for further appellate review, *see In re TCR Sports Broad. Holding, LLP v. WN*

Partner, LLC, 30 N.Y.3d 1005 (2017); *In re TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't Jan. 18, 2018).

At no point did either the Orioles or the New York courts suggest that MLB's advance gave MLB an ownership or financial interest *in the Nationals*. Instead, at most, the Orioles suggested that the advance (repayable only from the proceeds of the RSDC award) might have given MLB an interest *in the outcome of the RSDC arbitration*. *See id.* at *8-9; 153 A.D.3d at 157-58 (Andrias, J., concurring). Nor could MASN have made any legitimate argument that the advance created an interest in the Nationals themselves: the Nationals had no obligation to repay the advance, and MLB had no right to reach into the Nationals' pocket to recover the money.

[redacted] But that letter did not suddenly convert the $25 million advance into some MLB financial interest in the Nationals. [redacted] Nor did it purport to supersede the prior agreements concerning the advance, which made clear that the Nationals were *not* obligated to repay the money. The Orioles' characterization of the letter as evidencing a "loan" is thus false. The repayment was wholly voluntary; it was intended only to head off the Orioles' and MASN's anticipated (but meritless) argument that MLB would purportedly be biased from having a supposed interest in how much the RSDC would award. The First Department recognized that a mechanism (such as a bond) to "guarantee repayment of the advance to MLB regardless of the outcome of the arbitration" would suffice to avoid any colorable claim of bias in the RSDC arbitration, *see* 153 A.D. 3d at 158 (Andrias, J., concurring).

C. The 2018 Distributions Dispute

Every year from 2009 to 2017, MASN (controlled by the Orioles) had made cash flow distributions to the Orioles and the Nationals, by June at the latest. By June 2018, however, MASN had not done so, and so the Nationals inquired about the lack of cash flow distributions. Ex. 5. The parties exchanged correspondence on the issue over the next several months. By September 20, 2018, the parties had reached an impasse.

D. The Nationals submitted the 2018 Distributions dispute to the MLB Commissioner for arbitration, and the Orioles and MASN responded by asking the MLB Commissioner to determine arbitrability.

On October 5, 2018, the Nationals submitted the 2018 distributions dispute to the MLB Commissioner for arbitration, [redacted]

The Orioles responded on October 16, 2018, and *invoked* the Commissioner's jurisdiction, asking the Commissioner to determine arbitrability and direct the parties to mediate first. Ex. 7 at 1-3.

The Nationals replied on October 25, 2018. Ex. 8.

On November 8, 2018, MLB Deputy Commissioner Daniel Halem wrote to the parties that the Commissioner had determined arbitrability – specifically, the Commissioner "determined that the most productive course of action to achieve what he believes is everyone's goal – an efficient resolution of this issue – [redacted]" Ex. 9. The MLB Commissioner also determined that "the Nationals' arbitration demand will be held in abeyance until the parties report back on the results of the mediation." *Id.* (emphasis added).

The Orioles accepted the Commissioner's determination on arbitrability (which they had requested), and did not object to the Commissioner's holding the Nationals' arbitration demand "in abeyance."

The parties then engaged in mediation as directed by the Commissioner, utilizing a JAMS mediator. The mediation concluded on Friday, March 22, 2019, without resolution of the dispute.

Early that afternoon, the Nationals reported that outcome to the MLB Commissioner's Office, and asked that arbitration before the MLB Commissioner be scheduled promptly. Ex. 10.

E. The Orioles' After-the-Fact Arbitration Demand to the AAA

It was not until the night of March 22, 2019 that the Orioles submitted an arbitration demand to the AAA, asserting for the first time that MLB purportedly had a financial interest in the Nationals requiring the dispute to be arbitrated by the AAA. Ex. 11. The Orioles failed to disclose to the AAA that (i) the Nationals' arbitration had been pending before the Commissioner since October 2018 and (ii) the Orioles had previously invoked the Commissioner's jurisdiction to decide arbitrability of this very dispute.

On March 26, 2019, the AAA notified the parties that an administrative teleconference would be held on April 3, 2019.

On March 27, 2019, the Nationals submitted their objection to the AAA's jurisdiction to arbitrate the dispute. The Nationals notified the AAA that this dispute was already the subject of a prior pending arbitration demand before the Commissioner, and that the Orioles previously had not objected to, and indeed had invoked, the Commissioner's jurisdiction. Ex. 12. The Nationals also showed that MLB had no financial interest in the Nationals when the dispute arose. *Id.*

On March 29, without responding to the Nationals' letter of March 27, counsel for the Orioles asked the AAA to reschedule the administrative conference to the week of April 9. Ex. 13. Counsel for the Nationals responded shortly thereafter, stating that "[f]or the reasons set forth in our letter of March 27, 2019, the AAA does not have authority or jurisdiction to arbitrate this dispute, which was previously submitted to the Commissioner of Major League Baseball for arbitration pursuant to the parties' Partnership Agreement." *Id.* Counsel for the Nationals further stated that "[t]he Washington Nationals respectfully submit that it would be inappropriate for the AAA to convene any conferences, administrative or otherwise, in this matter, and object to the scheduling or holding of any such conferences." Thereafter, the AAA requested that the Orioles provide "comments."

The Orioles submitted their response early in the evening of April 1, 2019. By the next morning, April 2, the Nationals submitted a detailed reply to the AAA. Within no more than approximately one hour of receiving the Nationals' reply, the AAA responded to the parties, without any supporting analysis, stating that "[t]he AAA deems this to be an arbitrability issue to be determined by the Tribunal." Ex. 14. The AAA also notified the parties that the administrative conference would take place the next day, April 3, at 10:00 am. *Id.* The administrative conference has since been rescheduled for the morning of April 9, 2019. Ex. 15.

On April 4, 2019, MLB's Deputy Commissioner, writing "[o]n behalf of the Commissioner," wrote to the parties: "threshold questions exist as to whether the Commissioner has jurisdiction over this dispute and who should decide this jurisdictional question. The Commissioner invites the parties to submit their arguments as to these

questions, as well as proposals as to how the two for a should deal with the fact that competing arbitration proceedings have now been demanded, to my attention by no later than April 18, 2019. Each party may also respond to the other's submission by no later than May 2, 2019." Ex. 16. Nevertheless, the AAA on April 7 notified the parties that "it will proceed with the administration of this matter" and refer "the arbitrability issue" to an AAA tribunal, and will conduct an administrative conference call on April 9, 2019 at 11 AM. Ex. 18.

F. The New York Courts Rejected the Orioles' Previous Attempt to Bypass a Contractually-Agreed MLB Arbitration Forum.

This is not the first time that the Orioles have attempted to avoid their contractual obligations to arbitrate in an MLB forum and instead arbitrate before the AAA. The Orioles fought unsuccessfully to transfer the rights fee arbitration discussed above away from the RSDC and instead to the AAA. Even though Supreme Court had vacated the original RSDC award on grounds related to Proskauer's representation of the Nationals, Supreme Court also specifically rejected as "unavailing" MASN's request to "re-writ[e] the parties' Agreement" in order to compel arbitration outside of the RSDC. *See TCR Sports*, 2015 WL 6746689, at *13, n.21. The First Department affirmed. 153 A.D.3d 140. In so ruling, these courts *rejected* the Orioles' arguments that the RSDC purportedly was a biased forum – including the argument that MLB's $25 million advance to the Nationals had given MLB an improper financial interest in the outcome of the RSDC proceedings. *See TCR Sports*, 2015 WL 6746689, at *8-9; 153 A.D.3d at 143.

ARGUMENT

I. LEGAL STANDARD

A temporary restraining order and/or injunctive relief – including to enjoin arbitration – is appropriate where the movant can show (i) a likelihood of success on the merits; (ii) danger of irreparable injury in the absence of injunctive relief; and (iii) a balance of equities in its favor. C.P.L.R. § 6301; *see also Rinaolo v. Berke*, 188 A.D.2d 297 (1st Dep't 1992) (affirming grant of plaintiff's motion for injunction staying arbitration); *Brintec Corp. v. Akzo, N.V.*, 129 A.D.2d 447 (1st Dep't 1987) (reversing denial of application for preliminary injunction).

Where, as here, the underlying agreement concerns interstate commerce, the Federal Arbitration Act ("FAA") applies. *See Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252 (2005); *ImClone Systems Inc. v. Waksal*, 802 N.Y.S.2d 653, 654 (1st Dep't 2005); *see also TCR Sports*, 2015 WL 6746689, at *10, *aff'd*, 153 A.D.3d 140 (1st Dep't 2017).

The FAA provides judicial authority to stay arbitration proceedings. *See Advest, Inc. v. Wachtel*, 677 N.Y.S.2d 549, 660-61 (1st Dep't 1998); *Matter of Howe Associates (Comstock, Inc.)*, 605 N.Y.S.2d 859, 859 (1st Dep't 1993); *Delucia v. Portolano*, 14 Misc.3d 1230(A) (Sup. Ct. Nassau Cnty. 2007); *see also In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 140–42 (2d Cir. 2011); *Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P.*, 49 F. Supp. 2d 331, 342 (S.D.N.Y.), *aff'd*, 205 F.3d 1324 (2d Cir. 1999); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1449 n.23 (11th Cir. 1998) (citation omitted); *L.F. Rothschild & Co. v. Katz*, 702 F. Supp. 464, 468 (S.D.N.Y. 1988).

In *Jock v. Sterling Jewelers, Inc.*, 2010 WL 5158617, at *1-4 (S.D.N.Y. Dec. 10, 2010), the Court concluded that "as a necessary incident to its power to compel arbitration proceedings under § 4 of the FAA, it may preserve the integrity of those proceedings by enjoining later-filed

arbitrations that arise out of the same controversy." *Id.* at *3. *See also Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863, 867–68 (1st Cir. 1981) ("To allow a federal court to enjoin an arbitration proceeding which is not called for by the contract interferes with neither the letter nor the spirit of [the FAA].")[2]

II. THE NATIONALS ARE LIKELY TO SUCCEED ON THE MERITS.

"To establish a likelihood of success on the merits, '[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits.'" *Barbes Restaurant Inc. v. ASRR Suzer 218, LLC*, 33 N.Y.S.3d 43, 46 (1st Dep't 2016) (citations omitted). "A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive." *Id.* (citation omitted).

A. The Orioles Consented to the Commissioner's Jurisdiction and Asked Him to Determinate Arbitrability of this Very Dispute.

The Nationals initiated arbitration of this dispute before the MLB Commissioner in October 2018. The Orioles did not challenge the Commissioner's jurisdiction, but instead asked the Commissioner to determine arbitrability of the Nationals' demand – specifically asking the Commissioner to direct the parties first to mediate. The Commissioner did direct the parties to mediate first. And when the Commissioner at that time said that he would hold the Nationals' arbitration demand "in abeyance," the Orioles again did not object to the Commissioner's

[2] "The FAA was modeled after New York's arbitration law" such that "no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR." *Matter of Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 205-06 (1995)). Under the C.P.L.R., the court's authority to enjoin arbitration proceedings is codified in C.P.L.R. § 7503(b), which similar to the court's authority under the FAA, allows the court to stay proceedings where "a valid agreement was not made or has not been complied with."

jurisdiction to do so. Indeed, the Orioles then participated in the mediation the Commissioner had instructed the parties to undertake.

Case law is clear that a party can consent to arbitration in a particular venue based on its course of conduct. *See, e.g., Gvozdenovic v. United Airlines*, 933 F.2d 1100, 1105 (2d Cir. 1991) ("Although a party is bound by an arbitral award only where it has agreed to arbitrate, an agreement may be implied from the party's conduct."); *see also Safran Electronics & Defense SAS v. iXblue SAS*, 2019 WL 464784, at *5 (S.D.N.Y. Feb. 6, 2019) ("*Safran Electronics*") (finding that "SED Germany assumed the agreement to arbitrate these claims based on its past assertions to the French court"); *id*. at *4 ("In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate.") (*citing Thomson-CSF, S.A. v. American Aribtration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995) and other authorities).

Here, the Orioles in October and November 2018 indisputably consented to the Commissioner' jurisdiction in this dispute, expressly asking him to rule at that time on the arbitrability of the Nationals' arbitration demand. The issue here is *not* that the Nationals' arbitration claim was first filed. Rather, it is that after the Nationals submitted this matter to the Commissioner for arbitration, the Orioles did not argue that MLB had a financial interest in the Nationals that required arbitration before the AAA, but instead proceeded to consent to the Commissioner deciding arbitrability and to the Commissioner maintaining the Nationals' arbitration demand in abeyance.

The recent decision in *Safran Electronics*, 2019 WL 464784, is instructive. In that case, the relevant agreement provided that disputes should be arbitrated in Paris under French law, unless the dispute resulted from the sale of the product at issue to an end user outside of Europe,

in which case arbitration should be held in New York in accordance with the rules of the International Chamber of Commerce. *Id.* at *2. One party to the Agreement commenced arbitration in Paris, and then two weeks later another party commenced arbitration in New York. *Id.* The party that had commenced arbitration in Paris argued that the question of which was the proper forum should be decided in Paris, and asked the Court to enjoin the New York proceedings from addressing arbitrability or any other matters. *Id.* at *2-3.

Critically, however, the decision in *Safran Electronics* indicates that no party pursuing arbitration in New York had ever engaged in any conduct in the Paris proceeding to suggest that issues of arbitrability in that pending dispute should be decided in Paris. *Id.* at *4-5. That is, in *Safran Electronics*, nothing had happened comparable to the Orioles here invoking the MLB Commissioner's jurisdiction in 2018 to determine the arbitrability of the Nationals' arbitration demand to the Commissioner. Under the different specific circumstances in *Safran Electronics*, the Court declined to enjoin the New York arbitration. *Id.* at *6. But the decision indicates that the Court would have reached a different result if, as here, the parties pursuing the New York arbitration had previously engaged in conduct consenting to the jurisdiction of the Paris proceeding. Indeed, one issue raised in *Safran Electronics* was whether a particular party, SED Germany, could be subject to arbitration in Paris, given that it was not a signatory to the underlying agreement. *Id.* at *4. The Court found the answer was yes, because "SED Germany assumed the agreement to arbitrate these claims based on its past assertions to the French court." *Id.* at *5. The Court noted the principle that "[i]n the absence of a signature, a party may be

bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate." *Id*. at *4 (citations omitted).[3]

While the Orioles did make vague and general "reservations of all rights" in correspondence with the Commissioner's office, a party that fails to assert a *specific* jurisdictional objection to an arbitration is not entitled to save that specific objection for some later time. *See, e.g., Sistem Muhendislik InSaat Sanayi Ve Ticaret, A.S. v. Kyrgyz Republic*, 741 F. App'x 832, 834 (2d Cir. 2018) (party asserting one jurisdictional objection to arbitration but omitting the second waived right to assert the second objection at a later stage); *Stotter Div. of Graduate Plastics Co. v. District 65, United Auto. Workers, AFL-CIO*, 991 F.2d 997, 1002 (2d Cir. 1993) (party waived objection to selection of arbitrator by failing to "specifically" object, even though party objected to jurisdiction on different grounds).

B. [redacted]

[3] Cases such as *Apollo Computer, Inc. v. Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472 (1st Cir. 1989) and *Scone Investments, LP v. Am. Third Market Corp.*, 992 F. Supp. 378, 381 (S.D.N.Y. 1998) are inapposite, because they involved whether arbitrability should be decided by a court or an arbitrator. Case law involving AAA Rule 7(a) also is off point, because those cases concerned whether the parties had intended to commit the question of arbitrability to an arbitrator instead of a court. *See, e.g., Contec Corp. v. Remote Sol. Co.*, 398 F. 3d 205, 208 (2d Cir. 2005); *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005).

[redacted] *See Bayme v. GroupArgent Secs., LLC*, 2011 WL 2946718, at *4 (S.D.N.Y. 2011) ("The language in this agreement, which encompasses essentially any and all claims that the parties could bring, is substantially similar to an agreement that requires 'any and all' disputes to be submitted to the arbitrator, which has been held to evidence clear and unmistakable intent to submit the arbitrability question to arbitration."); *Smith Barney, Inc. v. Hause*, 655 N.Y.S.2d 489, 492 (1st Dep't 1997) ("the completely clear and straightforward language providing that 'any controversy arising out of or relating to any of [respondents'] accounts ... or ... with respect to this agreement or the breach thereof, shall be resolved by arbitration' evidences intent to have arbitrator decide arbitrability"); *Porta Systems Corp. v. Aponte*, 2000 WL 64941, at *1 (S.D.N.Y. 2000).

C. MLB Has No Financial Interest in the Nationals.

While it is dispositive that the Orioles previously consented to the Commissioner's authority to determine arbitrability of this dispute, it is also true that MLB has no financial interest in the Nationals that would require arbitration before the AAA. [redacted] At most, the loan would have given MLB a theoretical financial interest in the outcome of the separate RSDC arbitration on rights fees for 2012-2016, but certainly not a financial interest, theoretical or actual, in the Nationals themselves.

The Orioles effort to characterize the $25 million advance as a loan also ignores the contemporaneous documents confirming just the opposite. [redacted]

The February 2018 letter, in which the Nationals voluntarily agreed to repay the $25 million advance to MLB, similarly did not give MLB a "financial interest" *in the Nationals*. The letter provided that the Nationals would repay the advance on condition that MLB would timely

commence the 2018 RSDC arbitration when scheduled. MLB had *no* financial interest *in the Nationals* as an entity, nor in the outcome of the new RSDC arbitration.

MLB thus had no financial interest in the Nationals in July 2018. Certainly MLB has no such interest now, as the Nationals repaid the $25 million advance, with interest, by November 5, 2018, ten days before the start of the RSDC proceeding on November 15, 2018.

D. In the Alternative, the Proper Arbitration Venue Should Be Determined by this Court, Not by the AAA.

As discussed above, *see* Point II(B), *supra*, the arbitrator is to determine arbitrability where, as here, the contract through a broad arbitration clause manifests "clear and unmistakable" intent that the parties intended to submit questions of arbitrability to the arbitrator (here, the MLB Commissioner). *See NASDAQ OMX Group, Inc. v. UBS Securities, LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)) (courts "have found the 'clear and unmistakable' provision satisfied where a broad arbitration clause expressly commits all disputes to arbitration, concluding that *all* disputes necessarily includes disputes as to arbitrability.")

But when it is determined that the scope of an arbitration clause is ambiguous, the court should determine arbitrability. *NASDAQ OMX Group, Inc.*, 770 F.3d at 1031. The Second Circuit has rejected the argument that reference in an agreement to the AAA rules (which provide for determination of arbitrability by the arbitrator) is enough to demonstrate "'clear and unmistakable' intent to have the arbitrators themselves decide arbitrability" *Id.*

III. FORCING THE NATIONALS TO ARBITRATE IN THE WRONG FORUM WOULD CONSTITUTE IRREPARABLE HARM.

Forcing the Nationals to submit to arbitration in a forum to which they did not agree would cause irreparable harm. *See, e.g., PaineWebber, Inc. v. Johnson*, 888 F. Supp. 46, 49–50 (E.D. Pa. 1995) ("The Third Circuit has held that a party suffers *per se* irreparable injury when it

is forced to arbitrate claims it has not agreed to arbitrate. *Hartmann,* 921 F.2d at 515 … Although *Hartmann* addressed the issue of whether a claim could be arbitrated at all, we find that this principle applies equally to the issue of whether an agreement for an exclusive forum for arbitration can be enforced"). *See also Macquarie Holdings USA Inc. v. Rode*, 2012 WL 12882417 at *4 (C.D. Cal. Jan. 17, 2012) (requiring plaintiff to proceed with a FINRA arbitration, where the parties' contract called for arbitration elsewhere, "would completely deprive [plaintiff] of the benefit of its bargain under the Arbitration Agreement."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King*, 804 F. Supp. 1512, 1514-15 (M.D. Fla. 1992).

Other courts have similarly found that "there is no adequate measure of damages for the loss of a contract right to arbitrate disputes in a specifically agreed venue." *See Lodgeworks, L.P. v. C.F. Jordan Const., LLC*, 2011 WL 7428716, at *8 (D. Kan. Dec. 20, 2011), *report and recommendation adopted in part, rejected in part*, 2012 WL 628259 (D. Kan. Feb. 27, 2012), *vacated on other grounds*, 506 F. App'x 747 (10th Cir. 2012) ("Costs of travel to and from Texas and fees for local counsel, of course, are measurable damages. But those costs do not compensate for the loss of the right itself, for which Plaintiff has bargained. Accordingly, the harm is irreparable. There is no adequate remedy at law to compensate Plaintiff, if it loses its contractual right to arbitrate disputes with Defendant in Wichita, Kansas.").[4]

In *Leong v. The Goldman Sachs Group Inc.*, 2016 WL 1736164 (S.D.N.Y. 2016), the court enjoined a CFTC arbitration where the contract mandated arbitration in England under

[4] While the Tenth Circuit did not disturb the district court's findings on irreparable harm, the Tenth Circuit reversed the injunction on the separate ground that determining the venue for an arbitration was a procedural matter that should have been left to the arbitration panel. *Lodgeworks, L.P. v. C.F. Jordan Const., LLC*, 506 Fed.Appx. 747, 750 (10th Cir. 2012). However, that case (unlike here) did not raise the question of which of two pending arbitration venues should determine arbitrability.

rules of the London Court of International Arbitration, noting that "courts routinely hold that to be subjected to arbitration without one's consent qualifies as an irreparable injury that usually cannot later be compensated by monetary damages." *Id.* at *3. *BHP Billiton Petroleum (Americas) Inc. v. Atlantia Offshore Ltd.*, 312 S.W.3d 813, 817–18 (Tex. App. 2009), upheld an injunction blocking a "'second-filed' AAA arbitration'" that "involves the same parties and subjects of dispute as the private arbitration and is unauthorized." *Id.* at 817-18. The Court found that "without injunctive relief, [petitioner] would be irreparably harmed by being forced to arbitrate in a manner inconsistent with the Agreement and being subjected to a significant risk of inconsistent outcome." *Id.* (internal marks omitted).

IV. THE EQUITIES WEIGH IN FAVOR OF GRANTING INJUNCTIVE RELIEF.

"The balancing of the equities requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief." *Barbes Restaurant*, 33 N.Y.S.3d at 46. *See also Aon Risk Services v. Cusack*, 34 Misc.3d 1205(A) at *21 (Sup. Ct. N.Y. Cnty. 2011) (courts consider "whether the irreparable injury to plaintiffs is more burdensome than the harm to defendant through the imposition of the injunction") (citing *Metropolitan Steel Corp. Industries, Inc. v. Perini Corp.*, 855 N.Y.S.2d 441 (1st Dep't 2008)).

Here, forcing the Nationals to arbitrate in a forum to which they did not consent will irreparably harm the Nationals. *See* Point III, *supra*. On the other hand, no harm at all will come to the Orioles from an injunction that merely compels the Orioles to honor the terms of the Partnership Agreement. And this is all the more so, given that the Orioles consented to – indeed, *invoked* – the Commissioner's jurisdiction to determine arbitrability of this very dispute in October 2018 when the Nationals filed an arbitration demand before the Commissioner.

In addition, unlike the Nationals' current owners, it was the Orioles and MLB that negotiated and entered the Partnership Agreement in 2005. The Orioles cannot legitimately claim any prejudice from abiding by that agreement.

Meanwhile, the Nationals have complied with the Partnership Agreement in all respects and now merely seek to enforce its terms.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court enjoin Respondent from proceeding with the AAA arbitration it initiated.

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Respectfully submitted,

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Certification of Word Count

The undersigned hereby certifies that the foregoing MEMORANDUM OF LAW IN SUPPORT OF THE ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION contains 6,930 words according to the word count of the word-processing software used to prepare the response, excluding the caption, table of contents, table of authorities, and signature block.

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